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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR SHAW,

Defendant and Appellant.

A148318

(Alameda County
Super. Ct. No. 175413A)

Lamar Shaw was tried and convicted of first degree murder after he admittedly shot and killed Xzavier Johnson outside Shaw's home on High Street in Oakland. His personal use of a semi-automatic pistol in the killing resulted in a true finding under a section of the Penal Code¹ imposing a sentencing enhancement for personal use of a firearm. The sole issue Shaw raised initially on appeal is claimed error by the trial court in denying Shaw's post-conviction motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to discharge and replace his trial counsel so he could make a new trial motion based on ineffective assistance of trial counsel. The trial court heard his reasons for believing trial counsel was ineffective and denied the motion. We conclude the trial court did not err in denying the *Marsden* motion and therefore affirm.

After the appeal was filed Shaw raised two additional issues in supplemental briefs. First, he seeks a remand so the trial court may exercise its discretion to strike the enhancement under a statute that was enacted after the trial took place and while this

¹ All further statutory references are to the Penal Code.

appeal was pending. The People concede that such a remand is appropriate, and we agree and will remand for that limited purpose. Second, Shaw contends that under another new statute providing for mental health diversion, we should remand for the trial court to exercise its discretion to grant pre-trial diversion. The People contend Shaw is not eligible for diversion because, as recently amended, the statute precludes diversion for defendants charged with murder or voluntary manslaughter. We agree and therefore reject Shaw's request for a remand under that statute.

BACKGROUND

I.

Summary of Evidence at Trial

Shaw was charged with murder (§ 187) with enhancements for discharging a firearm (§ 12022.7, subd. (a)); causing great bodily injury and death (§ 12022.53, subd. (d)); personally discharging a firearm (§ 12022.53, subd. (c)); and personally using a firearm (§§ 12022.5, subd. (a), 12022.53, subds. (b), (g).) He waived the right to a jury trial, and his case was tried before Alameda County Superior Court Judge Stuart Hing. Following a ten-day trial, at which Shaw testified on his own behalf, the court found Shaw guilty of first degree murder and found all enhancements true.

The evidence at trial showed two cars, one containing two women and two young children and the other containing a woman and a man, arrived at the house Shaw shared with his mother and other family members in the morning on July 5, 2014. They had come to pick up a permit from a friend who lived in the same house as Shaw. The friend had obtained the permit for them to hold a birthday party, which was planned for later that day, in a local park. The friend was not there when they arrived, and they remained outside with their cars parked in front of the house. Ten to fifteen minutes later, Shaw and two other men arrived in a Buick and parked across the street. One of the women from the cars parked in front of Shaw's home, Jamikka Watkins, crossed the street and "exchanged some words" with Shaw. Not long after she argued with Shaw, his cousin, Rodney Smith, and Shaw's younger brother arrived in a truck and parked next to Shaw. The brother got out of the truck and went in the house. Shaw and Smith walked across

the street and told the people parked in front of his house to leave. A further argument ensued. Shaw and Smith then went through a side gate and into the house.

A few minutes later, Shaw and Smith emerged from the house wearing hoodies and armed with guns. Shaw had a semi-automatic handgun, and Smith was armed with an AK-47 assault rifle. Smith again told the people parked in front of Shaw's house to leave.

One of those people was Xzavier Johnson, Watkins's boyfriend. When Shaw and Smith came out with guns, Johnson, who was unarmed, backed up, put his hands in the air and told Shaw and Smith he and the women would leave. Shaw then raised his gun and shot at Johnson, who jumped, trying to avoid the bullet. Shaw fired several more shots at Johnson as Johnson fell and rolled down the hill. The car with the women and children pulled out and followed him down the hill and he jumped up and got inside their car. One of the women called 911, but when police arrived Johnson was unresponsive and they and paramedics were unable to resuscitate him, and he was declared him dead at the scene. An autopsy showed he had been shot four times: in the right side of his torso, his right thigh, left lower leg and one of his arms.

The People also proffered evidence that the gun used in the shooting had been used about two weeks earlier in a shooting in which two houses, both occupied at the time, were shot at, and multiple bullets were found in the walls and other parts of the interior of the houses. There was also evidence that the gun used to kill Johnson on July 5, 2014, had been shot earlier the same morning down the block from Shaw's house. The prosecutor argued that these earlier shootings of Shaw's gun, particularly the shooting earlier the same day, were relevant to Shaw's claim of self-defense and to his testimony (on cross-examination) that he did not have much experience with guns.

Shaw testified and admitted he shot Johnson intending to kill him. Shaw initially fled from the scene but turned himself in the day after the shooting and was interviewed by Oakland police. He testified at length about the many shootings he witnessed during his years growing up in Oakland, including some where he was shot at. He also testified about relatives and friends, some of whom were injured and others killed in gun violence

during the same period. For example, from the porch of his house he witnessed a shootout at a liquor store near his home in which his cousin's best friend was shot 30 times and killed. Shaw testified that he used Xanax and marijuana to help him sleep. He had stopped taking the Xanax about two weeks before the shooting incident.

Shaw testified that on the day of the shooting Watkins had threatened him and suggested he wasn't the only one who had weapons, and that she said she would have Johnson "get on him." This caused Shaw to fear violence and led him to call Smith. After Smith arrived and unsuccessfully tried to persuade the group to leave, Shaw went to his house and got his gun. When he came back out with the gun, Watkins said she would not leave until someone was dead. Johnson was speaking on his cellphone while staring at Shaw and backing up. Johnson said, "Don't trip. We ain't going nowhere," and then said, "I got something for all you n—s" and tried to open the car door.

Shaw believed Johnson was trying to get a gun from the car and was going to shoot him. Shaw believed Johnson must have had a gun in the car because he appeared to be taking on four men. Shaw did not think Johnson was getting in the car to leave because Watkins was standing up the hill away from the car. Afraid for his life, Shaw shot Johnson intending to kill him. Shaw did not retreat into his house because he thought Johnson would shoot at the house, where his young sister and nephew and his grandmother were staying.

A psychologist testified that Shaw had Post Traumatic Stress Disorder (PTSD) from the extreme violence he had witnessed growing up and the continuing violence in the neighborhood where he lived. He described Shaw also as anxious, paranoid, hypervigilant and in a dissociative state. These conditions did not ebb and flow for him; "[g]iven that he was basically living in a situation where, you know, there was no escape from the possibility of walking into a potentially lethal situation. He's been shot at repeatedly. He's been, you know, caught up in crossfire in a number of occasions. Where he lives, death, murder and mayhem are—that's part of the daily fabric of everyday life." The psychologist testified further that Shaw's compromised mental health, which was longstanding, was made worse by withdrawal from Xanax. He had

been hospitalized not long before the shooting because he had almost passed out and was found to have a lot of Xanax in his bloodstream. The withdrawal, which began in late June and was likely still going on at the time of the shooting, produced “more agitation, more nervousness, increased depression, problem sleeping and . . . paranoia.”

Shaw’s counsel argued that Shaw had acted out of fear and without the requisite intent, and that in assessing Shaw’s intent the court could consider mental disorder. This included the PTSD he suffered, which was the basis for the decisions he made, and his dissociative mental state, exacerbated by the withdrawal from Xanax. These factors supported a finding that this was an excused, justifiable homicide, or at worst, manslaughter.

The prosecutor argued that the murder was premeditated, as evidenced by Shaw having gone inside the house and put on a sweatshirt before coming out and shooting Johnson. Shaw made a conscious decision to call his cousin, Smith, for backup and to go inside and get a loaded gun and put on the hoodie to conceal himself. He could instead have stayed inside his house or left the scene in his friend’s car. Instead, he and Smith, both armed, came out. He made a conscious decision to shoot Johnson and shot at him six times, including after he had fallen and was on the ground.² There was a minute or two between when Shaw came out of the house with the gun and when he started shooting, which is also enough time for premeditation.

As to self-defense, the prosecutor argued Johnson, who was unarmed, had backed up with his hands in the air and told Shaw they would leave. There was no imminent danger to Shaw at that point. Shaw was standing outside of his house with his gun and backed up by Smith for one to two minutes before he shot Johnson. The reasonable person standard does not mean a reasonable person with PTSD. No one else reacted as Shaw did, and his use of deadly force was unjustified. There could be no imminent danger after Johnson started rolling down the hill attempting to get away, yet Johnson continued to shoot him. Shaw could have shot Johnson once but instead shot him six

² Shaw testified he shot the gun three times but each pull of the trigger released two bullets.

times. Shaw shot Johnson again after he fell and was on the ground trying to get away and could not have been a threat.

II.

Verdict

Within two weeks of the conclusion of trial, the court rendered its decision on the record finding defendant guilty of premeditated murder and finding true the special allegations that he personally and intentionally discharged a firearm causing great bodily injury and death to Johnson, personally inflicted great bodily injury, personally and intentionally discharged a firearm and personally used a firearm.

III.

Marsden Motion

After the court's decision was rendered, Shaw made an oral *Marsden* motion to discharge his appointed counsel. (See *People v. Marsden, supra*, 2 Cal.3d 118.) The judge to whom it was assigned eventually sent it back to the trial judge noting that the purpose of the *Marsden* motion was "to appoint new counsel to pursue motion for new trial due to ineffective assistance of counsel."

At the subsequent hearing on the *Marsden* motion, the court explained that the process entailed two steps; first, Shaw would explain the reasons he wanted the court to consider discharging his counsel, and second, his counsel could, if he wished, respond. Shaw mentioned eight issues, some of which he concedes the trial court "had before it sufficient detail about the matters" based on what it observed in the courtroom to "determine whether separate counsel was required to develop a claim of ineffective assistance of counsel." However, as to five of the issues, he contends the court failed to elicit enough detail to assess whether new counsel should be appointed to investigate and determine whether to make a motion, presumably for a new trial, based on ineffective assistance. We address only the latter claims below.

First, Shaw stated he had provided his counsel hospital records showing his near overdose on Xanax and complained that counsel failed to offer that documentation in evidence. Second, he contended there were additional witnesses who could have testified

on his behalf but were not called. Third, he complained that counsel had failed to ask questions on cross-examination that Shaw had suggested he ask. Fourth, his counsel, he argued, was too forgetful, giving as an example that the preceding week when his auntie came to court, counsel did not remember who his auntie was. Last, Shaw contended his counsel failed to show the court certain documents he thought counsel should have offered.

Shaw's trial counsel responded to these issues as follows.³ As to the medical records, counsel did not recall whether he had received them, but Shaw himself had testified about his problem with Xanax, and the psychologist had testified about the effects of withdrawal. Regarding uncalled witnesses, counsel had attempted to subpoena three witnesses through the investigator, who informed him two had moved and he had been unable to serve them despite efforts to do so, and a third had been injured in a shooting and could not come to court. One was the woman who had been asked to obtain the park permit for the birthday party, and she would possibly have testified that she did not invite Watkins and the others there and that they were there to cause trouble. The other two witnesses would have testified they had known Shaw for some time and he wasn't a violent man or someone who would start trouble.

As to cross-examination, counsel responded that lawyers do not always ask questions their clients want them to ask, such as questions to which they do not know the answer. As to his forgetfulness, he had never been diagnosed with Alzheimer's disease. He acknowledged that he should have remembered the woman who was Shaw's auntie when she came to court to testify, because she had appeared previously in the case. Finally, as to the documents Shaw thought should have been shown to the court, these were letters Shaw had written to counsel. Counsel stated while there may have been some way to have them admitted, he was able to elicit the content of the letters and Shaw's attitude through Shaw's testimony.

³ It appears the motion had initially been argued, at least in part, before another judge who then referred it back to the trial court; Shaw thus having already raised many of these arguments, counsel was familiar with them.

Although it had described the *Marsden* hearing as a two-step process, the trial court engaged in a third step, specifically, by allowing Shaw to have the “last word” on these issues. Shaw proceeded to talk about why he wanted to discharge trial counsel for a few minutes (two and a half pages of transcript) without interruption. He said when Byron mentioned something about an appeal in the middle of the trial, defendant believed he had given up on the case and wanted to fire him then but didn’t know if he could. He didn’t understand why lawyers would not ask questions they don’t know the answer to, and this didn’t make any sense. “That’s the point of asking the question to figure out the answer to.” He was convinced that if Byron had asked the questions Shaw wanted him to ask, it would have proved the two witnesses who came to testify against him (apparently referring to two of the three women who had parked in front of Shaw’s house and witnessed the shooting, Dyanisha McCree and Jacquelyn Watkins)⁴ were lying. Also, Byron had never mentioned that Shaw was not the one driving the car when the victim and the women arrived at his house or that Shaw was already at his house when they arrived. He was confident trial counsel had received his medical records because counsel had sent forms to Shaw and Shaw had signed them at trial. The forms directed Kaiser to release his medical records, and counsel had said he was going to get the records from the time Shaw almost overdosed on Xanax.

When Shaw finished his rebuttal, the court asked if the matter was submitted, and Shaw and his counsel responded affirmatively.

Before stating his decision, the trial judge said he would share some of the law under *Marsden* and stated there were cases that had refused to discharge counsel for declining to make motions or assert arguments a defendant wanted, failing to inspire trust in the defendant, disagreeing with the defendant regarding tactics and other matters. The court then denied the motion, observing that trial counsel had represented Shaw “better than I have seen in my 30 years” and finding “that he actually did not fail to investigate

⁴ The third woman, Jamikka Watkins, did not testify.

anything in this case” and “at no time” did anything to undermine defendant’s credibility. In fact, trial counsel had enhanced Shaw’s credibility in the way he presented the case.

DISCUSSION

I.

The Trial Court Did Not Err in Conducting the Marsden Hearing.

Shaw contends the trial court erred in its handling of the *Marsden* motion. Relying on this court’s opinion in *People v. Stewart* (1985) 171 Cal.App.3d 388 (*Stewart*), he contends the court erred in rejecting his claims that his counsel provided ineffective assistance without eliciting sufficient information to evaluate those claims. Specifically, Shaw contends the medical records he arranged for counsel to obtain and what they would have shown about his mental state “could not be fairly assessed in light of counsel’s inability to even recollect their existence.” The court did not ask Shaw to identify the witnesses his counsel failed to call or to explain what testimony they would have provided. He complains that the trial court erroneously relied on the statements of counsel to assess the claim. As to Shaw’s complaints about counsel’s cross-examinations, forgetfulness and failure to offer letters in evidence, the court failed, in his view, to elicit enough information from Shaw to enable it to evaluate his ineffective assistance claims.

In arguing that the court was required in effect to investigate Shaw’s ineffective assistance claims by interrogating him at the hearing, Shaw misconceives the trial court’s duties in hearing a *Marsden* motion. The court here generally asked Shaw to explain his basis for believing his counsel had been ineffective, and after allowing counsel to respond, gave Shaw the “last word” to explain further. That was all that was required.

In *Marsden*, our high court “held that ‘a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney.’” (*People v. Marsden, supra*, 2 Cal.3d at p. 124.) Thus, “[w]hen a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel’s inadequate

representation that the defendant wishes to enumerate.’ ” (*People v. Hines* (1997) 15 Cal.4th 997, 1023–1024.) A “ ‘*Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant’s allegations regarding the defects in counsel’s representation and decides whether the allegations have sufficient substance to warrant counsel’s replacement.’ ” (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1320.)

“A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court’s discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.” (*People v. Smith* (2003) 30 Cal.4th 581, 604 (*Smith II*).

A defendant is entitled to substitute counsel only if he or she makes an adequate showing under *Marsden*, that is, “ ‘whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ ” (*People v. Sanchez* (2011) 53 Cal.4th 80, 89 (*Sanchez*)). Only if he or she meets the *Marsden* standard is he or she entitled to substitute counsel. (See *Sanchez*, at pp. 88–89, quoting *People v. Smith* (1993) 6 Cal.4th 684, 695 (*Smith I*) [“ ‘[a]ppointment of counsel for the purpose of arguing that previous counsel was incompetent, *without an adequate showing by defendant*, can have undesirable consequences’ ”]; *Sanchez*, at p. 92 [holding it was error to appoint substitute counsel without sufficient showing that failing to do so would impair defendant’s right to counsel].)

A defendant is not entitled to appointment of “conflict” or “substitute” counsel “solely to evaluate a defendant’s complaint that his attorney acted incompetently”

(*Sanchez, supra*, 53 Cal.4th at p. 84) whether for purposes of a motion to withdraw a plea (*id.* at p. 90) or a motion for new trial. (*Id.* at p. 89 [quoting Court of Appeal opinion in *Sanchez*].) Substitute counsel may be appointed only if the defendant has made the requisite showing under *Marsden*, in which case new counsel is substituted for *all* purposes (see *Sanchez*, at pp. 84, 90, 92), including to investigate such possible motions. (*Smith I, supra*, 6 Cal.4th at p. 696.)

The standard of proof the defendant must meet is the same for both pre- and post-conviction *Marsden* motions. (*Smith I, supra*, 6 Cal.4th at p. 694.) “The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court’s discretion, which will not be overturned on appeal absent a clear abuse of that discretion.” (*Id.* at p. 696.) The court in *Smith I* disapproved any suggestion in earlier Court of Appeal decisions, including this court’s decision in *People v. Stewart, supra*, 171 Cal.App.3d 388, that the showing required to prevail on a post-conviction *Marsden* motion is less than the showing required in a pre-conviction motion. (*Smith I, supra*, at pp. 693–694.) “A defendant has no greater right to substitute counsel at the later stage than the earlier.” (*Smith I*, at p. 694.)

Applying these principles here, we conclude the trial court did not fall short, much less abuse its discretion, either in conducting the *Marsden* hearing or in holding Shaw failed to meet his burden.

Shaw’s arguments here add little to what he argued below. After spending many pages describing *Marsden* and case law addressing *Marsden*, his brief reargues the claimed deficiencies in his counsel’s performance in three pages. He first contends the failure to introduce his medical records “could not fairly be assessed in light of counsel’s inability to even recollect their existence.” Not so. The trial judge, having sat through the trial and served as the trier of fact, was aware that Shaw had testified at length about the many incidents of gun and other kinds of violence he had witnessed as a child and teenager, and the losses of several people with whom he was close due to gun violence. The judge heard Shaw’s mother testify briefly about the effects the violent incidents had

on her son and that he had never received counseling to address them. The court also heard Shaw's testimony that he used marijuana and Xanax to help him sleep but had stopped using Xanax two weeks before the shooting. Besides these witnesses, the trial court heard the testimony of the defense's expert psychologist, who testified at length about the effects of such prolonged exposure to gun violence and opined that Shaw suffered from PTSD, anxiety, paranoia and hypervigilance and was in a constant dissociative state. The psychologist also testified that Shaw used Xanax, alcohol and marijuana to calm himself and also took Xanax to address his nightmares and difficulty sleeping. Having stopped taking Xanax two weeks before the incident, Shaw was in withdrawal, exacerbating the symptoms Shaw was already experiencing, producing "more agitation, more nervousness, increased depression, problem sleeping and . . . paranoia." He testified about Shaw's hospitalization after losing consciousness and that Shaw was told to stop taking Xanax, although the court did not admit the psychologist's testimony about the facts on which his opinion was based for their truth.

In short, the judge was plainly in a position to determine whether the failure to offer Shaw's medical records regarding his hospitalization was a significant omission, much less one that could have amounted to ineffective assistance. The primary mental state defense was not about withdrawal from Xanax. It was that Shaw acted out of self-defense based on the belief that Johnson had a gun and would shoot him, a belief that was reasonable given Shaw's long history of exposure to deadly incidents of violence. It was not an abuse of discretion for the court to conclude Shaw had not made a prima facie showing of ineffective assistance based on the failure to offer medical records regarding his overdose or overmedication with Xanax. Shaw himself testified to his use of that drug and that he had stopped taking it shortly before the crime, and the psychologist testified the withdrawal would exacerbate the symptoms of his other mental disorders.

The same is true regarding the witnesses who did not end up testifying for Shaw, for two reasons. First, defense counsel identified the witnesses he believed Shaw was referring to and described what he thought their testimony could have been. He also explained why the witnesses were not called: in two instances the individuals had moved

and the defense investigator had been unable to locate and serve them with subpoenas, and in the third instance the witness, after having been interviewed, had been injured in a shooting and could not participate in the trial for that reason. Shaw complains that the court “never elicited from Mr. Shaw the identity of the witnesses, the proposed content of their testimony and their availability to testify at trial” and instead relied “solely on the statements of counsel to assess the claim.”

Shaw cites *Smith I*, *supra*, 6 Cal.4th at p. 692 for the proposition that counsel has an inherent conflict and cannot be expected to assist the defendant in making his challenge. That may be so, but that does not mean every defendant who makes a *Marsden* motion is automatically entitled to new counsel. Nor does it mean the trial court’s duty is to act as defendant’s counsel and to ferret out every possible fact or argument that could conceivably support the defendant’s complaints. Our high court has repeatedly described the trial court’s obligations in conducting a *Marsden* motion, whether one made before, during or after trial: “[T]he trial court must *permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.*” (*Smith II*, *supra*, 30 Cal.4th at p. 604, italics added; accord, *People v. Taylor* (2010) 48 Cal.4th 574, 599; *People v. Streeter* (2012) 54 Cal.4th 205, 230). The trial court in *Smith II* did precisely what the Supreme Court has held trial courts should do: it allowed the defendant to describe his specific complaints about the attorney’s representation and allowed the attorney to respond. (*Smith II*, at pp. 604–605.) The high court found no abuse of discretion and rejected the defendant’s contention that he was denied the opportunity to develop an adequate record of his complaints. “On the contrary,” it concluded, “the [trial] court gave defendant full opportunity to air all of his complaints, and counsel to respond to them.” (*Id.* at p. 606.)

The same is true here. The trial court’s handling of the *Marsden* hearing was a model worthy of being emulated. The trial court gave Shaw a full opportunity to explain the bases for his complaints about counsel’s performance. It began by explaining the *Marsden* process, asking Shaw to “think about any of the reasons that you’d like me to consider in discharging your attorney” and requesting that Shaw “share with [the court]

the reason.” The court advised Shaw it would be “taking notes” and “carefully listening.” After advising Shaw that his counsel would be permitted “to respond to the reasons that you give me,” the court instructed him to “go ahead” and then allowed him to state all of his concerns without interruption. Then, before his counsel responded, the court informed Shaw it would “give [him] another opportunity to speak.” After counsel spoke, the court did as promised, stating, “As I mentioned, I wanted to give you, Mr. Shaw, an opportunity to have the last word before I reach a decision.” And again, the court listened to Shaw’s statements until he had finished, without interruption. This enabled Shaw, if he believed trial counsel had failed to identify all the witnesses Shaw believed he should have called, or that counsel had misstated what Shaw hoped or expected their testimony to be, Shaw could easily have so informed the court. He did not. Indeed, he did not mention the witness issue at all in his rebuttal.

Shaw similarly complains that as to Byron’s “forgetfulness,” faulty cross-examination and unoffered documents, the court failed to “elicit the details underlying the claims.” He contends the court should have “elicit[ed] from [him] the details of the ‘proof’ that showed the witnesses were lying,” “the details . . . of all the ‘stuff’ which [he] claimed counsel forgot” and confirmation that the letters he wrote to his counsel were indeed the documents Shaw claimed should have been admitted in evidence. The premise of all these arguments is that the court was required to disbelieve trial counsel’s responses to Shaw’s complaints and assume Shaw would be unable to correct any errors or omissions when the court allowed him to speak a *second* time after he heard counsel’s responses. We cannot accept that premise, which would shift the burden to show ineffective assistance from the defendant to the trial court.

Shaw relies on *People v. Stewart*, *supra*, 171 Cal.App.3d 388 and cases citing it for his failure-to-elicited arguments. *Stewart* does not support these arguments. In *Stewart*, the defendant stated at the *Marsden* hearing that his personal doctor and “two witnesses up on the fourth floor” should have been called to testify. (*Stewart*, at p. 394.) The defendant explained why he thought the doctor should have been called but provided no information about the other two witnesses, and the trial court apparently did not hear

from counsel on the point or further inquire of the defendant. (See *id.* at pp. 397–398.) The court was able to determine there was no colorable claim of ineffective assistance regarding the failure to call the doctor, who could only have competently testified to a fact that was undisputed. (*Id.* at p. 397.) But the record did “not disclose what the testimony of [the other two] witnesses would have been had they been called,” and the trial court did not question appellant or, apparently, his counsel about them. (*Id.* at p. 398.) Our court held this omission prevented the trial court from properly evaluating the defendant’s *Marsden* claim. (*Ibid.*)

Stewart is a far cry from this case, in which the court invited Shaw to explain his reasons for thinking his trial counsel was ineffective, after he did so invited trial counsel to respond, and then after trial counsel provided significant responsive information, gave Shaw the floor a second time to address the issues further after having heard his counsel’s responses. Nor does *Stewart* stand for the proposition that the trial court must conduct a *Marsden* hearing in a particular way. While the trial court must inquire into the reasons a defendant contends his counsel has been inadequate and obtain basic information from him and his counsel to evaluate whether a prima facie showing of ineffectiveness has been presented, the trial court is neither an investigator nor an advocate. As long as the trial court permits the defendant to fully express his concerns and gives appropriate consideration to them in light of what it knows from the trial, this is all *Marsden* requires.

II.

Defendant Is Entitled to Remand for the Trial Court to Exercise Its Discretion to Strike the Firearm Enhancements.

In a supplemental brief, Shaw argued he was entitled to the benefit of the 2017 legislation granting trial courts discretion to strike or dismiss prior findings under the firearm-related enhancements, including those the trial court applied to Shaw under the mandatory sentencing enhancement provisions extant when he was sentenced. (§ 12022.5, subd. (c); § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, §§ 1, 2.) The People concede that a remand for that purpose is appropriate, and we agree. We will

therefore remand to permit the trial court to exercise its discretion to dismiss one or more of the firearm enhancements it imposed on Shaw as permitted by Senate Bill No. 620.

III.

Defendant Is Not Entitled to Conditional Reversal or Remand for Diversion.

In a supplemental brief filed after this case was fully briefed, Shaw argued the newly enacted mental health diversion statute, Assembly Bill No. 1810, sections 1001.35 and 1001.36, providing for the discretionary diversion of persons with qualifying mental health disorders that contributed to the commission of a crime, is retroactive and should be applied to him. However, as the People pointed out in their response, shortly after the enactment of Assembly Bill No. 1810, the Legislature amended section 1001.36 to exclude defendants charged with murder or voluntary manslaughter. (§ 1001.36, subd. (b)(2)(A); Stats. 2018, ch. 1005, § 1.) The amendment took effect on January 1 of this year. Shaw is therefore ineligible for diversion.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under sections 12022.5, subdivision (c) and 12022.53, subdivision (h).

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.